© The Author 2013. Oxford University Press and New York University School of Law.
All rights reserved. For permissions, please e-mail: journals.permissions@oup.com

Between text and context: Turkey's tradition of authoritarian constitutionalism

Turkuler Isiksel*

Downloaded from https://academic.oup.com/icon/article/11/3/702/789402 by guest on 26 May 2026

The laws should always humble the arrogance of domination.
Montesquieu

Constitutionalism is often understood to mean more than mere adherence to the formal terms of a constitution. Beyond this, it is usually associated with structuring the exercise of public power in line with a core set of principled commitments and, in doing so, rendering it legitimate. That said, it is possible to imagine a political system that practices robust constitutional discipline without meeting basic expectations of democracy, fundamental rights, human dignity, justice, or equality. With the example of the 1982 Turkish Constitution in mind, this article develops a theory of "authoritarian constitutionalism" as a system in which the constitution, rather than constraining the exercise of public power, is coopted to sanction oppressive uses of it. This discussion is situated against the backdrop of the enduring problem of "parchment barriers" in constitutional theory: authoritarian constitutionalism is instructive for understanding the extent to which the writ of the constitution shapes the beliefs, actions, and aspirations of the actors who inhabit the regime. When constitutional rule is marshaled to consolidate state power, it is strikingly effective at thwarting attempts at democratic reform. This suggests that constitutions do, in fact, "matter," though not uniformly as a force for political liberalization.

Constitutional revolutions tend to come in "waves." The most recent such wave swept through the post-Communist nations of Central and Eastern Europe in the 1990s. The political transitions prompted by the "Arab Spring" may yet usher in another. Like all revolutionary moments, however, constitutional transitions are laden with uncertainty.[1] However hopeful, progressive, and inclusive the constitutional text, the danger of authoritarianism lurks just around the corner from ratification. The laudable words of the constitution may end up being merely hortatory. We can think of many authoritarian systems in which the principles of legitimate political rule ceremoniously enshrined in the constitution have little to no bearing on how power is wielded

* Department of Political Science, Columbia University. Email: nti2002@columbia.edu.

1 For an important reflection on the many ambiguities of constitutional (re-)foundings, *see* Ruti G. Teitel, Transitional Justice (2002).

in practice. Where a discipline of constitutional rule is yet to take hold, political actors break constitutional rules whenever it suits their interests to do so, often resulting in arbitrary, unlawful, and oppressive exercises of political power.

James Madison diagnosed this problem in his eloquent defense of America's experiment in constitution making. Writing on the proposed US Constitution's provisions concerning the separation of powers, Madison famously asked:

> Will it be sufficient to mark with precision the boundaries of these departments in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power?[2]

In response, he argued:

> a mere demarcation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.[3]

Thus, Madison recognized that constitutional commands had no alchemy at their disposal; they could not cure statesmen of their greed and ambition or change human nature. Instead, Madison reasoned, the constitution could neutralize those ambitions by pitting them against one another, and forestall the tyrannical concentration of power by "giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."[4] Broadly construed, this implies that the parchment barriers problem can only be overcome insofar as constitutional commands channel the existing propensities, beliefs, and inclinations of political actors and, rather than try to eradicate them, arrange them in a well-calibrated institutional equilibrium.[5]

The "parchment barriers problem" is not only one of the the most pressing and most elusive task of post-foundational polities, but perhaps more importantly constitution making itself takes place under its long shadow. Where a constitution fails to "reconcile what right permits with what interest prescribes," as Rousseau put it, it is quickly outwitted by unscrupulous despots, and becomes a sad relic of its framers' aspirations.[6] Unfortunately, however, Madison's prudent counsel is sometimes neglected by constitutional optimists who ascribe rather more power to the words of the constitution than they are often accorded by the political actors who inhabit the "really existing" political system.

In this article, I will consider the problem of parchment barriers understood in the widest sense; that is to say, not merely as a problem of limiting the respective powers of the separate branches of government, but of establishing constitutional discipline over *all* exercises of public power. To be sure, certain kinds of constitutional rules may be particularly vulnerable to power-grabbing attempts or during times of emergency,

[2] James Madison, Federalist Papers no. 48.

[3] *Id.*

[4] *Id.*

[5] For a critique of Madison's institutional strategy of forestalling tyranny by making "ambition . . . counteract ambition," *see* Robert Dahl, A Preface to Democratic Theory ch. 1 (1956).

[6] Jean-Jacques Rousseau, The Social Contract and The First and Second Discourses bk. I, at 155 (Susan Dunn ed., 2002).

Downloaded from https://academic.oup.com/icon/article/11/3/702/789402 by guest on 26 May 2026

not least in newly established, transitional, or deeply divided political systems. Often, these include procedural conditions such as term limits, electoral rules, legislative or judicial hurdles, or procedures of constitutional amendment. Equally frequent are violations of substantive constitutional guarantees, particularly those relating to the protection of basic rights and freedoms. In this article, my aim is not to give a thorough account of possible extra-constitutional actions that may doom constitutional order, but to emphasize the difficulty and indeed unlikelihood of establishing and maintaining constitutional discipline in the face of the deeply rooted authoritarian tendencies of *all* governments known to us.

There is a further methodological hurdle in terms of gauging constitutional discipline. For one thing, constitutional systems tend to translate any political controversy into a constitutional question, making it exceedingly difficult to establish whether or not a given regime generally conforms to the terms of its constitution. In this essay, I will work with a low threshold for constitutional discipline, and consider as "disciplined" a regime that does not regularly and brazenly blow past the barriers set up by the terms of its constitution. Other considerations can help in making this judgment; for instance, that of whether a regime takes the question of constitutional amendment seriously. Judicious proposals to amend constitutional provisions in a way that would enhance rather than diminish constitutional discipline would be evidence of fealty to the constitutional system, whereas hasty, frequent, or indiscriminate use of amendment procedures may conceal attempts at usurping power. In the former case, we would expect to see diligent weighing of the wording of particular constitutional provisions by political actors, and widespread public debate about the merits of proposed amendments. In my account, such constitutional engagement would constitute evidence that a political community, that is to say, current and aspiring office-holders as well as citizens and civil society institutions, takes its constitution seriously. A further indicator of constitutional discipline may be whether changes (particularly smaller changes) in the provisions of the constitution have an appreciable effect on subsequent exercises of public power, such as changes in the kinds of laws that can be passed, how those laws are interpreted and implemented, and the levels of protection afforded to basic rights as a consequence of constitutional tinkering.

If we take into consideration these and other hallmarks of constitutional discipline, the contemporary Turkish political system, in spite of its pronounced authoritarian features, seems to operate within the bounds of *its own* constitutional order.[7] This is to say that political actors abide by the terms of the constitution as far as procedural rules are concerned, and such egregious violations of the constitution as ignoring term limits, canceling elections, usurping offices are extremely rare compared to other

[7] As I make clear below, the constitutional history of modern Turkey has been punctuated by military coups that either forcibly altered the constitution or replaced it altogether. I address the military's defining role in Turkey's constitutional system below. My generalization here applies to civilian political actors (particularly the holders of public offices including elected representatives, bureaucrats, administrative agencies, members of the judiciary, and so on, but also to influential civil associations such as political parties, social movements, student associations, trade unions, etc.).

Downloaded from https://academic.oup.com/icon/article/11/3/702/789402 by guest on 26 May 2026

authoritarian regimes.[8] Governments relinquish power when they lose elections, which tend to be free of electoral fraud.[9] Elected politicians overwhelmingly tend to obey court rulings, including those handed down by Turkish high courts on politically controversial cases such as party closures and constitutional amendments.

Most tellingly, some of the most vigorous political debates in Turkey over the past decade have had to do with constitutional reform. This is such a high-stakes struggle precisely because the actors who inhabit the system understand the constitution as being fundamentally determinative of their political fortunes. The system functions on a shared assumption that the constitution *matters*; that it cannot simply be tossed aside once a party is in power. For better or worse (and I will suggest that it is not obviously for the better), all of this suggests that Turkey has overcome the parchment barriers problem: the constitution is understood and respected as a binding source of normative authority in the conduct of ordinary political life.[10] This is borne out by the fact that political factions whose interests run contrary to constitutional rules, even where they are able to secure electoral or parliamentary majorities, try to alter the terms of the constitution through amendment rather than disregarding or violating them.

This poses something of a puzzle. Ordinarily, we would expect a polity with a high degree of constitutional discipline to have an equally high standard of basic rights protection. Turkey, however, disappoints that expectation. Rather than running through the full roster of Turkey's chronic failures in this area, we might look at recent cases

[8] But *see* my caveat regarding the military in *supra* note 7.

[9] *See* the detailed reports by the Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation for Europe for the 2002, 2007, and 2011 parliamentary elections, *available at* http://www.osce.org/odihr/elections/turkey.

[10] I use the term "ordinary political life" advisedly, because I do not mean to imply that either citizens or politicians regard the constitution as the highest source of normative authority in Turkish politics. Indeed, it is doubtful that any constitutional regime regards the constitution as the highest source of political authority: although all exercises of public power within the ordinary political process should be traceable to the constitution and accord with its terms, the authority of the constitution itself is often traced to a higher source, whether popular sovereignty, a transcendent notion of natural rights or human dignity, divine sanction, or some combination of these. In Turkey, the military and the secular elite view the Kemalist political tradition as the paramount normative authority of which any legitimate Turkish constitution must be an expression. By contrast, the AKP and other populist parties routinely cite the will of the popular sovereign as the origin of all political authority, including that of the constitution. Appeals to popular sovereignty get folded into a pervasive ultranationalist discourse that posits a primordial, timeless Turkish nation as the source of constitutional authority, a discourse that is shared by virtually all parties on the spectrum except those representing Kurds. Lastly, Muslim conservatives in Turkey sometimes refer to the tenets of Islam as the grounds for secular legislative authority, presumably including the constitution, although Sharia remains a politically risky subject particularly for conservative parties.

In this connection, Sinem Gürbey argues that a government-authorized 2006 treatise released by the Turkish "Presidency for Religious Affairs" (the *de facto* ministry of religious affairs which regulates the publicly sanctioned practice of Islam in Turkey) grounds the authority of all secular law in divine sanction, with the implication that public policy deemed by religious authorities to be incompatible with the requirements of Islam ought to be considered illegitimate. This is certainly not too distant from the conception of political legitimacy espoused by the AKP's conservative wing. *See* Sinem Gürbey, Rethinking Popular Sovereignty and Secularism in Turkey and Beyond (2011) (unpublished PhD dissertation, Columbia University, on file with the author), at 94–103 discussing the following text: Hayreddin Karaman, Ali Bardakoğlu & H. Yunus Apaydin, İlmihlal vols I-III (2006).

Downloaded from https://academic.oup.com/icon/article/11/3/702/789402 by guest on 26 May 2026

before the European Court of Human Rights as a reliable indicator of the scale of human rights abuses committed in Turkey over the past few years. In its 2011 annual report on Turkey's progress towards accession, the European Commission documents the following:

> During the reporting period [October 2010–September 2011], the European Court of Human Rights (ECtHR) delivered a total of 418 judgments finding that Turkey had violated rights guaranteed by the ECHR. The number of new applications to the ECtHR went up for the fifth consecutive year. Since October 2010, a total of 7,764 new applications have been made to the ECtHR. Most of them concern the right to a fair trial and protection of property rights. In September 2011, 18,432 applications regarding Turkey were pending before the ECtHR.[11]

In 2010, Turkey paid €24.5 million in fines for human rights abuses ranging from grossly unjust periods of pre-trial detention to torture and ill-treatment, politically motivated curbs on the freedom of expression, and forced resettlement, among others.[12]

Nonetheless, complaints to the ECtHR reflect only a small proportion of the problem, as cases can only be brought by plaintiffs who have already sought and failed to find remedies within the Turkish legal system. Heaped at the base of the pyramid are the vastly more numerous abuses such as those committed against Kurdish citizens during the course of the ongoing civil conflict, persecutions of peaceful political activists, journalists, writers, and publishers, due process violations, and impunity for state-sanctioned perpetrators of many of the crimes in question.[13]

Against the background of pervasive abuses of human rights, the tightness of constitutional discipline in Turkish politics is somewhat incongruous. How can a regime be appreciably constitutional, that is to say, function within the parameters of its constitutional order *despite* systematically denying its citizens the basic protections that a liberal democratic political system must afford? This is the puzzle that underpins my theory of authoritarian constitutionalism. I will begin by giving a conceptual account of this idea, and return to the Turkish case to analyze it in more detail.

1. What is authoritarian constitutionalism?

Constitutionalism, understood as conditioning the exercise of political power in accordance with a change-resistant legal framework, is famously subject to what Alexander Bickel called a "countermajoritarian difficulty."[14] By entrenching the rules concerning the operations of political institutions, constitutions formally constrain the ability of democratic publics to collectively govern themselves.[15] However strong its popular

[11] European Commission, Turkey 2011 Progress Report, SEC (2011) 1201 final, Brussels Oct. 12, 2011, at 20.

[12] *Id.* at 20.

[13] *Id.* at 22.

[14] Bickel used this phrase to refer specifically to the democratic legitimacy of judicial review. Here, I use the same term expansively to describe the *prima facie* constraining effect of constitutional norms on popular will. *See* Alexander Bickel, The Least Dangerous Branch? The Supreme Court at the Bar of Politics (1986).

[15] Others have rejected the characterization of constitutional rules as "limits" to political power as simplistic, construing them as commitment devices that enable and facilitate the exercise of legitimate political authority. *See* Stephen Holmes, Passions and Constraint (1995).

Downloaded from https://academic.oup.com/icon/article/11/3/702/789402 by guest on 26 May 2026

mandate, an elected government cannot make decisions that contradict the terms of the constitution unless it resorts to the special and often extraordinarily onerous procedures required to alter those terms. At the same time, many constitutional rules can be justified in terms of *facilitating* the exercise of democratic self-rule rather than curtailing it.[16] Elementally, the procedural rules of the constitution make it possible to identify who the self-governing 'people' is in the first place. Second, procedural rules also define how the will of the people is to be expressed and understood, and how that will may be translated into policy. Although provisions concerning the separation of powers appear to curtail the authority of the branches of government, they thereby guard against the arbitrary use of power and enable the effective functioning of government through a division of labor.[17] Similarly, substantive norms such as those related to fundamental rights enable citizens to exercise their private and public autonomy.[18] In other words, even where constitutional rule appears to have an anti-majoritarian thrust, it maintains an indispensable, delicate balance between the fixity of norms and the reflexivity of democratic will. Constitutionalism may be *prima facie* counter-majoritarian, but it is not thereby or of necessity *anti-democratic.*

By contrast, constitutional limitation is rarely understood to be authoritarian in and of itself; that is, fundamentally contradictory to the exercise of individual autonomy by citizens. To the contrary, since the American and French Revolutions, constitutional rule has become a virtual synonym for legitimate political rule. Notwithstanding the fraught relationship between popular sovereignty and the rule of law,[19] constitutionalism is rarely described as a downright anti-democratic form of political ordering. It is even more of a stretch to construe constitutionalism as an instrument of despotic rule, or to imagine a constitutional system that allows the state to ride roughshod over the liberties of citizens. For this reason, the notion of an authoritarian constitutionalism may at first glance come across as a flat-out contradiction in terms.

[16] Constitutional theorists who view the proper role of entrenched norms as enabling democratic self-government include Bruce Ackerman, We The People. Foundations (1991); John Hart Ely, Democracy and Distrust. A Theory of Judicial Review (1980); Jurgen Habermas, Between Facts and Norms (1996); Frank Michelman, *Law's Republic*, 97(8) Yale L.J. 1493 (1988); Philip Pettit, Republicanism. A Theory of Freedom and Government (1999), esp. ch. 6; James Tully, Strange Multiplicity: Constitutionalism in an age of diversity (1995).

[17] Stephen Holmes describes the separation of powers as "a form of the division of labor, permitting—in some cases—a more efficient distribution and organization of governmental functions. Specialization improves everyone's performance." Holmes, *supra* note 15, at 165.

[18] Jürgen Habermas argues that rather than viewing negative liberty and democratic autonomy as irreconcilable priorities of liberal and republican strands of political thought respectively, we must emphasize the "internal link" between the status of individuals as authors and addressees of the laws, in other words, between public and private autonomy. Thus, the institutionalization of the public autonomy of citizens relies on a prior recognition of their status as legal subjects, which necessitates the recognition of civil liberties. *See* especially, Jürgen Habermas, *On the Internal Relation between the Rule of Law and Democracy*, in The Inclusion of the Other (1998). More broadly, *see* Habermas, Between Facts and Norms, *supra* note 16.

[19] Frank Michelman frames the central dilemma of constitutionalism as that between a liberal democratic polity's commitment to law-rule on the one hand, and self-rule on the other. The problem is to find a way of "understanding how laws and rights can be both the free creations of citizens and, at the same time, the normative givens that constitute and underwrite a political process capable of creating constitutive law." Michelman, *supra* note 16, at 1505.

Downloaded from https://academic.oup.com/icon/article/11/3/702/789402 by guest on 26 May 2026

In recent years, however, the sanguine assumption of a coincidence between the constitutional mode of political rule on the one hand, and respect for liberal ideas of political legitimacy on the other, has come under critical scrutiny. It is hardly worth pointing out that the mere existence of a written constitution does not guarantee a liberal political regime (witness the parchment barriers problem). Neither does the absence of a constitutional document necessarily imply despotism. It is less obvious, however, whether a political system in which all institutions and actors respect and uphold the authority of constitutional norms is *necessarily* a liberal regime. A critique of that proposition is implied by Ran Hirschl's "hegemonic preservation thesis," which holds that far from resting on a substantive commitment to human dignity, individual autonomy, justice, or any other intrinsically valuable principle, many constitutional norms are often pragmatic attempts by elites to immunize their preferred policies against future majoritarian challenge.[20] According to Hirschl, beleaguered political elites resort to constitutional entrenchment in order to "preserve or enhance their political hegemony by insulating policy-making processes from the vicissitudes of democratic politics."[21] The idea that constitutional entrenchment may serve as just another strategy of political domination highlights the nature of constitutional norms as contingent outcomes of power struggles. That, in turn, means that it is gratuitous to simply assume that all constitutional provisions are normatively valuable *or* that adherence to constitutional norms necessarily implies siding with liberty over authority.

In similar vein, Melissa Schwartzberg argues that it is a fallacy to identify rigid constitutional entrenchment either with effective rights protection or the realization of democratic self-rule. Schwartzberg points out that, as a historical fact, the strategy of making certain norms immutable has "a rich legacy of protecting narrow, instrumental decrees, such as treaties, and unjust laws against religious toleration and, most notoriously, slavery."[22] Even where the normative content of the entrenched norms seems incontestable, "[e]ntrenchment reifies a particular formulation of rights that, emerging from political processes of deliberation, negotiation, and bargaining during constituent assemblies, may be normatively attractive or unattractive, adequate to their challenges or inadequate."[23] Entrenchment may foreclose institutional innovation, adaptation, and learning, magnifying the inadequacies, imperfections, and even injustices of the norm in question. In other words, a constitutional rule, just like any other legal norm, can be unjust, oppressive, or illiberal; but in contrast to an ordinary legal norm, it is that much more difficult to change. To borrow James Tully's metaphor, where constitutional rules diminish the ability of citizens to contest acts of domination, they are tantamount to an "imperial yoke" that hegemonizes rather than liberates.[24] Thus, particular

[20] Ran Hirschl, *The Political Origins of the New Constitutionalism*, 11(1) Ind. J. Global Legal Stud. 71 (2004). *See also* Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism (2004).

[21] Hirschl, *The Political Origins of the New Constitutionalism*, *supra* note 20, at 90.

[22] Melissa Schwartzberg, Democracy and Legal Change 25 (2007).

[23] *Id.* at 22

[24] Tully, *supra* note 16, at 5.

Downloaded from https://academic.oup.com/icon/article/11/3/702/789402 by guest on 26 May 2026

constitutional norms can be used in a way that denies rather than fulfills the substantive promises we associate with constitutionalism.

Each of these critiques illustrates that constitutional rules are manipulable and need not reflect the normative commitments with which we conventionally associate constitutionalism. In the extreme case, constitutional rule might itself be deployed as a systematic device for political domination, or what I call authoritarian constitutionalism. Can we imagine a political system that takes advantage of the mechanisms of constitutional rule to limit the basic civil and political liberties of its citizens?

Alexander Somek has used the term "authoritarian constitutionalism" to describe the Austrian regime between the abdication of the Austrian Parliament in 1934 and *Anschluss* with Nazi Germany in 1938.[25] For Somek, authoritarian constitutionalism incorporates all of the major features of constitutional rule except democratic representation and accountability, which it rejects in the name of ensuring "social integration or social reconstruction."[26] That is to say, it emphasizes values other than democracy, most notably ideas of public order, social cohesion, peace, and conformity.[27] According to the logic of authoritarian constitutionalism, Somek argues, representative assemblies and electoral politics compromise and interfere with the attainment of these public goods, requiring the Leviathan to step in. Although this attitude is common to many authoritarian ideologies, what distinguishes authoritarian constitutionalism is its fealty to the rule of law and its rejection of the arbitrary use of power, commitments that survive the rejection of the democratic principle.

Although Somek's account of authoritarian constitutionalism is compelling, his emphasis on the lack of democratic assemblies as the defining feature of this kind of constitutional rule does not do justice to the profound challenge of authoritarian constitutionalism. Although democracy and constitutionalism are simultaneously affirmed by many liberal polities, they are nevertheless analytically separable: as an abstract notion, democracy makes sense without constitutionalism; and constitutionalism can be thinly defined without resort to the principle of democracy (for instance, as the subordination of political power to the rule of law). This implies that democracy is a good that is *external* to constitutionalism, at least in a purely formal sense.[28] As

[25] Alexander Somek, *Authoritarian Constitutionalism: Austrian Constitutional Doctrine 1933 to 1938 and its Legacy*, in Darker Legacies of Law in Europe 361 (Christian Joerges & Navraj Singh Ghaleigh eds., 2003).

[26] *Id.* at 362.

[27] Somek judiciously refrains from using the term "fascist" to characterize this form of constitutional rule as it applies to the Austrian case, and I share his terminological circumspection in the Turkish context. On the one hand, authoritarian constitutionalism, like fascism, relies on methods of repression to preserve the state. On the other hand, in the Turkish instance, it discourages (and in some cases criminalizes) mass mobilization by citizens, while fascism is distinguished from other kinds of despotism by its encouragement of such mobilization (within strictly patrolled ideological limits, of course).

[28] I accept Habermas's thesis, explained *supra* note 18, that a just constitution must uphold the delicate balance between liberal and republican conceptions of autonomy as equally indispensable or, in James Tully's words, "equiprimordial." (James Tully, *The Unfreedom of the Moderns in Comparison to their Ideals of Constitutional Democracy*, 65(2) Modern L. Rev., 204, 207 (2002)). Nonetheless, my point here is about the analytical detachability of the rule of law and democracy as distinct commitments.

Downloaded from https://academic.oup.com/icon/article/11/3/702/789402 by guest on 26 May 2026

such, Somek's description of a non-democratic form of constitutionalism is an empirical rarity, but not a profound conceptual challenge.

By contrast, it is possible to construe authoritarian constitutionalism as a denial of the *internal goods* promised by constitutionalism itself. On the one hand, we can think of constitutionalism as precluding arbitrary, absolute, or unaccountable uses of public power by definition. For instance, authoritarianism is most often manifested through the use of state power to steamroll individual rights and liberties. Nonetheless, such steamrolling often comes at the expense of the rule of constitutional law. And yet, as I will show with the aid of the Turkish example, constitutionalism can also take the form of meticulous adherence to a constitution whose terms directly and unequivocally subordinate the liberties of citizens to an oppressive conception of public order and security. Such a system, I will argue, is properly termed "authoritarian" and "constitutional" at the same time. In what follows, I will show why this is an accurate characterization of the Turkish political system insofar as it observes the terms of a written constitution while jettisoning the ideals for which constitutional*ism* stands in contemporary political discourse.[29] I will then use the Turkish case to draw out another possible solution to the parchment barriers problem: that of altogether eliminating the constitution's potential as a source of resistance to domination.

2. Turkey's authoritarian constitutionalism

Turkey's functioning system of competitive elections, representative institutions, and constitutional discipline deceives many observers (including well-meaning commentators who tout the "Turkish model" for other Muslim-majority states)[30] into thinking that Turkey has crossed a rigorous threshold of modern liberal democracy. The contemporary emphasis on minimalist democracy, whose guiding criterion is competitive elections and the alternation of political parties in office, certainly encourages this conclusion.[31] Moreover, insofar as the current Turkish constitution provides for a detailed framework

[29] It is common in Turkish political discourse to describe the 1982 Constitution as "authoritarian." Reformist commentary both in the public sphere and in academia frequently makes this characterization. Because the term is used in a bewildering variety of senses and to advance any number of political viewpoints, I am unable to address these individually here, with one exception. In an insightful article on the Turkish constitutional tradition, Andrew Arato describes the 1982 Constitution as "semi-authoritarian." While I share many of the substantive criticisms Arato raises in his work on Turkish constitutionalism, my primary aim in this article is to use the Turkish constitutional experience to develop a theory of authoritarian constitutionalism as a distinct mode of constitutional practice. *See* Andrew Arato, *Democratic Constitution-Making and Unfreezing the Turkish Process*, 36(3–4) Phil. & Soc. Criticism 473, 477 (2010).

[30] *See* the excellent commentary by Karabekir Akkoyunlu, who argues that the idea of a "Turkish model" "adds to the growing hubris of [Turkish] decision-makers, who seem less tolerant of dissent every day," whereby "security matters once again trump issues of democracy and human rights," threatening to turn Turkey into "a strategic outpost in a western-backed Sunni security alliance." Karabekir Akkoyunlu, *The "Turkish model" isn't good for Turkey*, Hurriyet Daily News, Feb. 8, 2012, http://www.hurriyetdailynews.com/the-turkish-model-isnt-good-for-turkey-.aspx?pageID=449&nID=13239&NewsCatID=396.

[31] *See, e.g.*, Adam Przeworski, *Minimalist Conception of Democracy: A Defense*, in Democracy's Value 23 (Ian Shapiro & Casiano Hacker-Cordon eds., 1999).

Downloaded from https://academic.oup.com/icon/article/11/3/702/789402 by guest on 26 May 2026

of democratic government (institutions which moreover function as set out in the constitution), it would be excluded from the category of authoritarian constitutionalism as Somek defines that term. And yet, as I will show through a brief consideration of its constitutional history, Turkey illustrates a paradoxical deployment of constitutional mechanisms to *deny* precisely those principles we expect constitutionalism to uphold.

Constitutionalism has a considerable pedigree in Turkish politics, which caught up with the Western trend of limiting sovereign power through higher law in the late 19th century.[32] The constitutional experiment of 1876, which sought to transform Ottoman absolutism into a constitutional monarchy with a king-in-parliament model of sovereignty proved short-lived, with Sultan Abdulhamid II suspending the constitution (*Kanûn-i Esâsî*) after a mere two years. In the ensuing decades, however, the power of the Sublime Porte gradually weakened, culminating in the restoration of the constitution in 1908. This time, an elected legislature dominated by the Union and Progress Party seized power, dethroning the sultan and amending the 1876 constitution to reflect its own rising political power. Crucially, this seismic shift away from an imperial/absolutist system to a nationalist/popular sovereigntist regime was articulated as a demand for constitutional rule. For this reason, the revolution of 1908 and the concomitant amendment of the Ottoman constitution in 1909 can be considered as the historical juncture at which constitutionalism became a dominant theme in Turkish political discourse.[33]

Indeed, the re-founding of the Turkish state following the post-WWI collapse of imperial rule was conducted partially as an exercise in constitution-making: in 1921, a self-appointed constituent assembly enacted the *Teşkilât-ı Esasîye Kanunu* or the Law of Basic Establishment, a provisional 23-article document setting up parliamentary authority alongside the now-moribund Ottoman state.[34] That rudimentary text was replaced in 1924 by a more extensive constitution that formally replaced the *ancien régime* and set out a new institutional framework on a republican (non-monarchical) footing. Article 103 of the 1924 Constitution explicitly claimed the status of the supreme law of the land, although it did not provide for judicial review given that the latter had not yet taken hold in the continental tradition on which the Turkish constitution was based.[35] This document also featured a relatively extensive bill of rights modeled on

[32] This is not counting the 1808 *Sened-i Ittifak*, which was an agreement between the notables and the Sultan concerning the rights of the former *vis-à-vis* the latter. It was, however, a largely *ad hoc* concession by the Sultan and did not constitute a comprehensive legal framework for government as we would expect a modern constitutional document to do. Ergun Özbudun & Ömer Faruk Gençkaya, Democratization and the Politics of Constitution-Making in Turkey 7 (2009). For a comprehensive analysis of the historical continuities between constitutionalism during the late Ottoman Empire and in modern Turkey, *see* Bülent Tanör, Osmanlı-Türk Anayasal Gelişmeleri 1789–1980 [Ottoman-Turkish Constitutional Developments] (2005).

[33] That said, it would be easy to overstate the purity of the Union and Progress Party's constitutional motives. As Perry Anderson points out, the Party resorted to constitutionalist discourse as a "means" to the preservation of the empire. By the end of the Balkan War in 1912, that discourse had morphed into a malevolent ethnic nationalist ideology. Perry Anderson, The New Old World 403–404(2009).

[34] Taha Akyol, Atatürk'ün İhtilal Hukuku [Ataturk's Revolutionary Law] 129 (2012).

[35] Kemal Gözler, Türk Anayasa Hukuku [Turkish Constitutional Law] 57–75 (2000). The Austrian Constitution—whose inaugural constitutional court was Hans Kelsen's brainchild—had been enacted in 1920.

Downloaded from https://academic.oup.com/icon/article/11/3/702/789402 by guest on 26 May 2026

the French Declaration of the Rights of Man and of the Citizen, defining freedom as "engaging in any activity that does not harm others" and drawing on "natural right" to delineate individual freedom in accordance with "the boundaries of the freedom of others."[36] The 1924 Constitution remained in force (albeit with some formal and informal amendments)[37] until 1961, when a new constitution was introduced in the wake of a military coup.

The 1924 Constitution's admirable assurances of popular sovereignty and natural right give little hint as to the real nature of the regime that claimed its sanction. The founding period of modern Turkey was characterized by the pervasive institutional and ideological hegemony established by Mustafa Kemal and his Republican People's Party (the present-day CHP). Despite the existence of an elected legislature, the CHP viewed virtually all expressions of dissent as reactionary and existential attacks on the "Kemalist"[38] project ("*irtica*"), deploying profoundly authoritarian measures to defend its interpretation of otherwise liberal-sounding principles such as secularism, republicanism, and popular sovereignty.[39] The 1924 Constitution's basic rights guarantees soon became irrelevant as a result of draconian anti-sedition laws, unrestrained executive authority, and widespread prosecutions of political opponents through the so-called "Courts of Independence" (*İstiklâl Mahkemeleri*).[40] Further afield, the implosion of the Ottoman regime gave Mustafa Kemal the opportunity to reestablish public institutions (most notably the military, parliament, bureaucracy, and the educational system) in conformity with his idiosyncratic ideology of "Westernization," which involved state-enforced modernization in the cultural, political, and economic realms.[41] Under his leadership, the CHP established a framework of tutelary authority ("*vesayet*") that has been administered by the military, judiciary, and the intellectual and bureaucratic elite throughout the history of the Republic.[42] Among these, the armed forces have assumed primary responsibility over

[36] Art. 68: "Hürriyet, başkasına muzır olmıyacak her türlü tasarrufatta bulunmakdır. Hukûk-u tabiîyeden olan hürriyetin herkes için hududu başkalarının hudûd-ı hürriyetidir." Cited in Gözler, *supra* note 35.

[37] Gözler, *supra* note 35.

[38] Parla and Davison define Kemalism as "the name given to Mustafa Kemal Atatürk's and his party's political thought and practice and the persistently official and semiofficial, hegemonic ideology of the Turkish Republic." Taha Parla & Andrew Davison, Corporatist Ideology in Kemalist Turkey: Progress or Order? at *vii* (2004).

[39] The so-called "principles of Ataturk" include the rubrics of republicanism, secularism, nationalism, populism or popular sovereignty, statism, and modernization ("*inkılapçılık*"), although each of those terms has acquired contextual significance within the history of the Kemalist revolution and departs radically from any generic understandings. For a detailed interrogation of the content of these principles under their largely illiberal Kemalist gloss, *see* Parla and Davison, *supra* note 38, chs. 4–5. *See also* Akyol, *supra* note 34.

[40] Akyol, *supra* note 34, at 97–129, 469–507; Osman Can, Darbe Yargisinin Sonu [The End of Coup Adjudication] 101 (2010); Ergun Özbudun, 1924 Anayasasi [The 1924 Constitution] 66–67 (2012).

[41] *See* Murat Belge, Militarist Modernleşme. Almanya, Japonya ve Turkiye [Militant Modernization. Germany, Japan, and Turkey] (2011). Osman Can writes: "Westernization and modernity became vehicles for ensuring the ideological dominance of a single party and the way of life that it represented." Can, *supra* note 40, at 101. My translation.

[42] Tanör, *supra* note 32, at 324–326; Can, *supra* note 40, at 101–114; Asli Ü. Bâli, *The Perils of Judicial Independence: Constitutional Transition and the Turkish Example*, 52(2) Va J. Int'l L. 235, 246–247 (2012).

Downloaded from https://academic.oup.com/icon/article/11/3/702/789402 by guest on 26 May 2026

enforcing ideological conformity within the state apparatus.[43] Most importantly, the military has controlled the drafting of every constitutional document to date, a prerogative which it justifies with reference to its self-ascribed guardianship role over the Republic's founding principles.[44] This vanguardist understanding of its own role emancipates the Turkish military from civilian oversight and positions it as a supraconstitutional actor.

Although Turkey was ruled by popularly elected legislatures until 1960, the first alternation in power away from the CHP did not take place until 1950. Shortly after the CHP grudgingly allowed for competitive elections, the opposition Democratic Party (DP) swept into power in a landslide victory. Although the DP's decade-long rule began with modest political liberalization, it quickly became marked by social unrest, political polarization, the persecution of minorities, and restrictions on the freedom of expression. Having regarded the DP's growing predominance and its harassment of political opponents as a threat to the Kemalist project, the military overthrew the DP government in 1960 and executed its top leaders.[45] Upon seizing power, the military command set about drafting a new constitution to replace the 1924 document. Puzzlingly, although the 1961 Constitution was drafted by a constituent assembly that was tightly vetted by the junta,[46] it is nevertheless recalled for its relatively liberal content.[47] On the basic rights front, the 1961 Constitution drew inspiration from the then-unfolding 20th-century rights revolution, including the European Convention on Human Rights, the Universal Declaration of Human Rights, and the 1949 German Constitution, enshrining a relatively wide catalog of

[43] Nilufer Narli, *Civil–Military Relations in Turkey*, 12 Turk. Stud. 107 (2000); William Hale, *The Turkish Army in Politics, 1960–73*, *in* Turkish State, Turkish Society 53 (Andrew Finkel & Nükhet Sarman eds., 1990); Gareth Jenkins, Context and Circumstance: The Turkish Military and Politics (2001).

[44] Article 35 of the Turkish Armed Forces Internal Service Code, promulgated on Oct. 1, 1961, states that: "The mission of the Armed Forces is to watch over and protect the Turkish homeland and the Turkish Republic as stipulated by the Constitution." (My translation). *Available at* http://www.mevzuat.gov.tr/MevzuatMetin/1.4.211.pdf.

[45] This coup is widely attributed to the military's concerns over the eroding hegemony of the Kemalist tradition as a result of the moderate religious challenge from the DP. The DP represented a forceful opposition to the traditional rule of the CHP, with which the military had been aligned since the founding of the republic. Other factors that motivated the coup include the military's unease about political polarization, the DP's overtures towards the US (which were perceived as a threat to Turkish independence), growing civil strife, and its own diminishing prestige and political status. Nonetheless, the Justice Party (AP), DP's successor, managed to reach an accommodation with the military in the 1960s and 70s, as I will discuss briefly below. *See also* Hale, *supra* note 43.

[46] The constituent assembly, formed in 1961, consisted mainly of delegates appointed by the Committee for National Unity from among Kemalist state elites, including select representatives of the bar, press, trade unions, university administrations, bureaucracy, and the judiciary. The Committee for National Unity itself served as an upper chamber of the constituent assembly, keeping tight control of the drafting process. *See* Ergun Özbudun, Contemporary Turkish Politics: Challenges to Democratic Consolidation ch.3 (2000); Kemal Gözler, Anayasa Hukukuna Giriş [Introduction to Constitutional Law] 185 (2011).

[47] Perry Anderson argues that the progressive rights guarantees of the 1961 constitution were drafted by legal scholars and essentially slipped under the military's radar during "a temporarily fluid situation, in which the military were not united." Anderson, *supra* note 33, at 436.

Downloaded from https://academic.oup.com/icon/article/11/3/702/789402 by guest on 26 May 2026

individual rights of "universalistic" tenor.[48] The remarkable spectrum of liberal safeguards, democratic freedoms, and labor-friendly social and economic provisions of the 1961 Constitution contrast favorably with the 1982 document, to be discussed shortly.

Breaking with the unbridled popular sovereigntism of the 1924 Constitution,[49] the 1961 text provided for the separation of the powers and checks and balances among the three branches of government, delegated power to autonomous administrative agencies, and established relative autonomy for higher education institutions. In addition, the Constitution strengthened the independence of the judiciary and established (for the first time) a constitutional court empowered with judicial review. Although the separation of powers, the independence of the judiciary, and a system of checks and balances are traditionally considered as the lynchpin of a liberal political system;[50] however, the same institutional devices were marshaled to fulfill quite different functions in the Turkish context. The framers intended to fragment state power in order to sap the power of the majoritarian legislature, which they viewed as subject to partisan capture and potentially threatening to Kemalist predominance. Thus, a greater measure of institutional autonomy was meant to ensure elite control of major public institutions.[51] For the same purpose, the 1961 Constitution established an upper chamber where members of the military junta assumed the status of permanent (lifetime) senators, a move meant to bring the legislative process under constant military supervision.[52]

Notwithstanding the relatively progressive provisions of the text, over the next two decades, the 1961 Constitution was beset by the challenges of governing in a profoundly illiberal political context, in other words, by the parchment barriers problem. The 1960s were marked once again by social unrest and political instability.[53] The center-right government of the Justice Party (successor to the DP), the opposition

[48] Bülent Tanör, Türkiye'nin Insan Hakları Sorunu [Turkey's Human Rights Problem] 318 (1990).

[49] Özbudun & Gençkaya, *supra* note 32, at 12–13. Taha Akyol shows that Mustafa Kemal espoused a theory of undivided popular sovereignty, criticizing the idea of divided sovereignty as "contrary to nature" and an ally of monarchical rule. By contrast, he declared unitary sovereignty to be a "mathematical" and "demonstrable truth" (quoted in Akyol, *supra* note 34, at 39–45 (my translation)).

[50] James Madison's formulation is emblematic of this position: "the accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, may justly be pronounced the very definition of tyranny." Madison, The Federalist Papers, no. 47. Similarly, Art. 16 of the French Declaration of the Rights of Man and of the Citizen of 1789 proclaimed that "[a] society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution." (My translation).

[51] Hootan Shambayati, *Courts in Semi-democratic/Authoritarian Regimes: The Judicialization of Turkish (and Iranian) Politics*, *in* Rule by Law: The Politics of Courts in Authoritarian Regimes 283, 290–291 (Tom Ginsburg & Tamir Moustafa eds., 2008).

[52] It would be an exaggeration to describe the 1961 Constitution as a paradigmatic liberal constitution as it retained some notably authoritarian features. For instance, it created the notorious National Security Council, which comprises military commanders and government ministers and has for decades functioned as the highest policy organ of the Turkish state. Since the early 2000s, the powers of the NSC have been scaled down. *See* n. 65 *infra*.

[53] Tanör, *supra* note 32, 405–407.

Downloaded from https://academic.oup.com/icon/article/11/3/702/789402 by guest on 26 May 2026

CHP, and the military were quick to blame these ills on the permissiveness of the 1961 Constitution. As Tim Jacoby writes, civilian and military leaders made common cause in attacking "the liberality of the 1961 constitution [as] a luxury Turkey could ill-afford."[54] Meanwhile, the newly minted Constitutional Court repeatedly declined to enforce the extensive catalog of rights and liberties enshrined in the constitution, accepting sweeping restrictions on grounds of preserving public order and security.[55]

The turbid decade culminated in another coup in 1971 when, upon the military's prompting, the Justice Party ceded power in favor of a non-elected "technocratic" cabinet endorsed by the military command, which restored order through the imposition of martial law. Most tellingly, the 1971 coup was followed by a series of constitutional amendments designed to tighten public order at the expense of the civil liberties promised (but never quite realized) by the 1961 Constitution. According to the amended text, basic rights protections were made subject to a general restriction on the basis of the "unity of the state, the protection of the republic, national security, public order, the common good,"[56] while specific restrictions were introduced into fundamental rights provisions such as those guaranteeing the freedom of association, press freedom, and due process.[57] Other amendments strengthened the military's independence from civilian control by exempting the defense budget from civilian scrutiny.[58]

Notwithstanding this extensive curtailment of the liberal safeguards of the 1961 Constitution, neither the military nor the civilian governments that ruled the country during the 1970s were satisfied with the changes. The years leading up to the 1980 coup were marked by a conspicuous laxity of constitutional discipline on the part of the military and of the civilian governments, which engaged in repressive policies that violated the spirit of the 1961 Constitution. The 1970s were once again punctuated by periods of martial law, severe political repression directed towards left-wing social movements such as student associations and trade unions, and curbs on the freedom of expression, all in contravention of constitutional safeguards.[59] During the same period, the military used overt and covert means to communicate its political preferences to ruling governments, which labored under the long shadow of military takeover. For this reason, many observers have described the 1960s and 1970s as a period of joint rule by the military and various civilian governments, with the military increasingly uneasy about the perceived

[54] Tim Jacoby, Social Power and the Turkish State 138 (2004). Turkish constitutional scholar Kemal Gözler writes that the crisis atmosphere fueled by the gridlocked cabinets and legislatures of the 1970s were blamed on the 1961 constitution, which was thought to weaken state authority in general and the executive branch in particular. Gözler, *supra* note 46, at 190.

[55] Part of this failure of enforcement resulted from individuals' lack of standing to bring constitutional complaints under the 1961 constitution. However, as Belge illustrates, the Constitutional Court's refusal to enforce the constitution's fundamental rights guarantees was doctrinal as well as political. *See* Ceren Belge, *Friends of the Court: The Republican Alliance and Selective Activism of the Constitutional Court in Turkey*, 40(3) L. & Soc. Rev. 653, 671–674 (2006).

[56] Article 11 of the 1961 Constitution, as amended in 1971 by Law No. 1488. Turkish text (as amended) *available at* http://www.anayasa.gen.tr/1961ay.htm.

[57] Articles 29, 22, and 30 of the 1961 Constitution respectively, as amended in 1971 by Law No. 1488 and amended again (in the case of Art 30 on due process) in 1973 by Law No. 1699.

[58] Article 127 of the 1961 Constitution, as amended in 1971 by Law No. 1488.

[59] Jacoby, *supra* note 54, at 136–137.

Downloaded from https://academic.oup.com/icon/article/11/3/702/789402 by guest on 26 May 2026

inability of shifting coalition governments to keep the peace throughout the 1970s.[60] That period culminated in the brutal coup of 1980, in which the military's general command seized power, dissolved the national assembly and all political parties, detained civilian politicians, banned party cadres from political activity, and set about drafting a new constitution which would be ratified in 1982 and remains in force today.[61]

The 1982 Constitution veered sharply away from the relatively liberal text and spirit of the beleaguered 1961 Constitution, and should be understood as a paradigmatic instance of authoritarian constitutionalism. Accordingly, it is useful to draw a distinction between two periods of Turkish constitutionalism, the first (1961–1980) characterized by a relatively liberal constitution crippled by a serious parchment barriers problem, and the second (1983–present) characterized by an authoritarian constitution and remarkably tight constitutional discipline. Once I draw the contours of the 1982 regime, I will explain the significance of this contrast. Briefly, my claim will be that the parchment barriers problem is likely to arise only when the constitution in force provides for a relatively wide scope for civil and political liberty by means of substantive guarantees and procedural devices such as a system of checks and balances and the separation of powers. By contrast, an authoritarian constitution, whose distinctive features I will shortly illustrate, can more easily to secure constitutional discipline since it enshrines the illiberal attitudes and beliefs already espoused by the political elite that brought it into being.

First, the differences between the 1961 Constitution and the 1982 Constitution cannot be attributed to their authorship. Both documents were drafted by assemblies selected and controlled by the military: just like the 1982 Constitution,[62] the military's high command largely dictated the terms of the 1961 Constitution as well as the amendments to that document in 1971 and 1973. Thus, both constitutions were the result of coups in which the military claimed extra-constitutional authority as the self-appointed guarantor of the principles of Kemalism. Even though the text of every post-Ottoman Turkish constitution attributes sovereignty to the people, with the arguable

[60] As Narli points out, the military kept up its end of the deal by enforcing constitutional discipline on radical officers within its own ranks who favored extinguishing civilian rule through an indefinite military takeover. Narli, *supra* note 43, at 111–113. *See also* Richard H. Dekmejian, *Egypt and Turkey: The Military in the Background*, *in* Soldiers, Peasants, and Bureaucrats: Civil–Military Relations in Modernizing Societies 28 (Roman Kolkowicz & Andrzej Korbonski eds., 1982).

[61] As I note briefly in the conclusion, the 1982 Constitution has been extensively amended since the 1990s. Most of the liberalizing changes were enacted in the wake of Turkey's admission to candidacy for full membership of the European Union in 1999. For an overview of the changes up to 2004, *see* Ergun Özbudun & Serap Yazici, Democratization Reforms in Turkey, 1993–2004 (2004). The constitution was amended again in 2010 on a number of points, the most controversial of which proved to be the provisions on the composition of the constitutional court, which were widely perceived as a court-packing attempt by the ruling AKP. For a detailed analysis, *see* Asli Ü. Bâli, *Courts and Constitutional Transition: Lessons from the Turkish Case*, 11(3) Int'l J. Const. L. 451 (2013). For a critique, *see* Andrew Arato, *The Constitutional Reform Proposal of the Turkish Government: The Return of Majority Imposition*, 17(2) Constellations 345 (2010).

[62] As Özbudun and Gençkaya write, the military officers who had orchestrated the 1980 coup designed the constitution-making process such that an assembly whose members were appointed by the officers was given a consultative role in the drafting process, while the officers on the National Security Council kept "absolute power to amend or reject the constitutional draft prepared by the Consultative Assembly, with no machinery envisaged to resolve the differences between the two chambers." Özbudun & Gençkaya, *supra* note 32, at 19–20.

Downloaded from https://academic.oup.com/icon/article/11/3/702/789402 by guest on 26 May 2026

exception of the 1924 Constitution, Turkey has never seen an instance of popular constitution-making—hence the decades-old and still-unrequited demand for a "civilian constitution" (*sivil anayasa*).[63] In this sense, although both documents attribute sovereignty to the people, neither was democratic in its origin.

Rather than the authorship of the text *per se*, what makes the 1982 Constitution authoritarian is its total capitulation to the military's agenda of complete social and political hegemony.[64] Whereas the 1961 Constitution allowed for the resumption of civilian life once power was restored to democratic institutions, the terms of the 1982 Constitution were such that they did not require the military to ease its iron grip on politics even once it allowed the resumption of parliamentary rule. In other words, the constitution drafted by the junta acted as the placeholder for military rule even though the soldiers were technically back in their barracks. As long as civilian elites observed constitutional discipline, the military did not need to rule directly.

To this end, the 1982 Constitution established a number of monitoring mechanisms through which the military could direct the mundane operation of legislative, executive, and judicial processes. First, the powerful National Security Council, composed of the military's high command and key government ministers, serves as a *de facto* higher cabinet in charge of setting the government's agenda, directing sensitive policy matters, and surveying the conduct of the civilian cabinet.[65] Second, the Turkish legal system came to rely increasingly on the parallel justice system of the

[63] The drafting of the 1924 Constitution by the Constituent Assembly is hard to classify as an *exclusively* militarist moment of founding, although the vanguard headed by Mustafa Kemal in the 1920s was certainly dominated by officers, and the Constituent Assembly was imperfectly representative of those whom it claimed to represent. In comparison with later constitutional transitions in the 60s, 70s, and 80s, the 1920s represented a more fundamental moment of transition involving the shift from empire to nation-state. By contrast, in the subsequent three instances of constitutional change, the nature of the regime and the extent of its territory and population were no longer in question.

[64] That is to say, in formulating the concept of authoritarian constitutionalism, I do not mean to limit it to constitutions whose origin is anti-democratic. In theory, it would be possible to imagine a popular instance of constitution-making that nevertheless produces an authoritarian constitution, for instance by irrevocably entrusting political authority to an unaccountable person or group, or by dramatically curtailing the rights of all or a minority of citizens (e.g. by setting up a repressive theocracy).

[65] Originally a creation of the 1961 Constitution, the National Security Council is composed of the President of the Republic, the Prime Minister and top cabinet ministers, and the top five commanders of the armed forces, including the Commander-in-Chief and the commanders of the Land, Sea, Air Forces and the Gendermarie. Although the powers of the NSC are nominally limited to matters of national security, Art. 118 of the 1982 Constitution defines its commission in notoriously expansive terms, including safeguarding the unity, territorial integrity, and independence of the state, and the protection of the "well-being and security" of the Turkish people. The 2001 constitutional reforms have scaled down its functions and powers, abolishing its executive powers and reducing its role, at least on paper, to that of an advisory body which reports to the cabinet. Moreover, its composition was altered to provide a majority of civilian members, while a civilian Secretary General was appointed for the first time in August 2004. A law passed in December 2003 stipulates that the decrees governing the activities of the Secretariat can no longer be classified. Furthermore, the Council's representatives were removed from such civilian bodies as the High Audio Visual Board (RTÜK) and the Board of Higher Education (YÖK). Nonetheless, the NSC continues to set the direction of Turkey's "grand strategy" by maintaining an up-to-date "National Security Policy Document" with which all legislative and executive activity must accord. For an overview of the changed role of the NSC, see Commission of the European Communities, 2004 Regular Report on Turkey's Progress Towards Accession COM (2004) 656 (Brussels, Oct. 6, 2004).

Downloaded from https://academic.oup.com/icon/article/11/3/702/789402 by guest on 26 May 2026

State Security Courts, which featured military judges empowered to try civilians on charges of separatism and sedition, producing a steady stream of political prisoners that included journalists, publishers, human rights advocates, politicians, and other peaceful activists.[66]

Just as it gave constitutional sanction to military control of civilian life, the 1982 Constitution further insulated the military itself from civilian monitoring. Keeping in step with the 1971 post-coup amendments, the 1982 Constitution exempted the military's budget and operations from civilian control, while expanding the social security and subsidies afforded to the officer corps.

Among the various mechanisms by which the military has exercised a constitutionally mandated control of civilian life, none is more indicative of the authoritarian spirit of the 1982 Constitution than its expansive provisions concerning emergency rule. In an arresting approximation of Carl Schmitt's terminology, the Turkish expression for constitutionally mandated emergency rule,[67] "*Olağanüstü Hal*," translates as the "state of exception." Once declared, the state of exception authorizes the government to suspend basic rights and due process guarantees, and to legislate by decree. Moreover, although the government (not the military) declares the state of emergency, and although that declaration is subject to parliamentary approval, it may be extended indefinitely, and may cover all or parts of the country. Thus, the state of emergency declared in 1987 ostensibly to restore order in two Kurdish provinces was renewed a total of 46 times in up to 14 provinces, and lasted until the end of 2002.[68] For nearly 15 years of slow-burning civil war, constitutionally mandated emergency rule deprived millions of citizens of basic rights protections, allowing rampant extrajudicial killings, disappearances, torture, ill-treatment, forcible displacement, and countless other grave abuses. Thus, the 1982 Constitution has overseen the expansion and normalization of procedures of emergency rule in entire swaths of the country for most of the constitution's existence. *Olağanüstü Hal* bears out Schmitt's conception of the state of exception as entailing "the suspension of the entire existing order," whereby "the norm is destroyed by the exception."[69]

While such brutality is hardly unprecedented in the annals of repressive regimes, what is important for the present purposes is that these rights violations were not acts of wanton lawlessness. The violence of emergency rule in Turkey cannot be understood

[66] The State Security Courts (DGMs) predated the 1982 Constitution. They had been established by amendments made to the 1961 Constitution in 1973 following the 1971 coup. Legal changes in 1999 removed the military member from the three-judge panels, and the DGMs themselves were abolished by the 2004 constitutional reforms and their functions have been transferred to the new *Örgütlü Suçlar Ağır Ceza Mahkemeleri* (Assize Courts for Organized Crime).

[67] The Constitution divides emergency rule into two kinds, less and more serious respectively: the first is a "state of exception" (*Olağanüstü Hal*) that may be declared in response to natural disasters, grave economic crises or civil unrest (Arts. 119–121). The second, "*Sıkıyönetim*," encompasses states of insurrection and war (Art. 122). In each case, the declaration is made by the president, cabinet, and the National Security Council and is subject to the approval of parliament.

[68] "23 Yil Sonra Resmen Olağan Hal," Hürriyet, Nov. 30, 2002, *available at* http://hurarsiv.hurriyet.com.tr/goster/ShowNew.aspx?id=112742.

[69] Carl Schmitt, *Definition of Sovereignty* [1922], *in* Political Theology. Four Chapters on the Concept of Sovereignty 12 (George Schwab trans., 2005).

Downloaded from https://academic.oup.com/icon/article/11/3/702/789402 by guest on 26 May 2026

as a parchment barriers problem, that is, as a failure on the part of state institutions to observe the constitutional limits on their authority. Rather, the violations were anticipated and sanctioned by the established constitutional regime. They may have been violations of natural rights as referenced in the 1924 Constitution, but the acts in question do not necessarily contradict the positive rights norms enacted in 1982. For instance, in the case of *Olağanüstü Hal*, the nominally "exceptional" format of authoritarian rule was internal to the constitution, meaning that it was "ordinary" in the sense of being a constitutionally mandated exemption from constitutional guarantees of basic rights.

For this reason, authoritarian constitutionalism is distinct from a constitutional order that allows for exceptional and tightly patrolled departures from constitutional normality, such as that advocated in the post-9/11 period by no less a liberal stalwart than Bruce Ackerman.[70] Despite its name, Ackerman's controversial proposal for an "emergency constitution" is all about *limiting* the scope of political authority claimed by public power (particularly presidential unilateralism) and stopping the gradual erosion of constitutional safeguards and civil liberties as a result of the collective psychological trauma generated by terrorist attacks. That is to say, the Ackermanian "emergency constitution" is intended to preserve constitutional liberties by preventing the insidious backslide towards authoritarian constitutionalism.[71] By contrast, Turkey's 1982 Constitution is permeated by the spirit of emergency rule and is designed primarily to circumscribe the liberties themselves rather than govern their restriction. One might go so far as to say that democratic procedures and rights guarantees are the exceptional provisions of the 1982 Constitution, whose text is shot through with references to and anticipations of states of emergency. For instance, each of the rights enumerated in the text is subject to a general restriction concerning emergency rule and martial law: article 15 provides that under conditions of war or national emergency, the "use" of fundamental rights and freedoms may be "partially or wholly" suspended as needed, and that "precautions contrary to the protections afforded by the Constitution may be adopted."[72] That is to say,

[70] Bruce Ackerman, Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism (2006). Intellectual precursors to this idea in modern political philosophy include Niccolò Machiavelli and even John Locke himself, who believed it to be compatible with limited government. *See* especially Niccolò Machiavelli, Discourses on Livy (Harvey C. Mansfield & Nathan Tarcov trans. and eds., 1996), esp. Bk. I, chs. 34–35; and John Locke, Second Treatise of Government (1980 [1690]), esp. ch. XIV. Clinton Rossiter's 1948 treatise examines the forms of emergency rule practiced by constitutional democratic regimes under crisis conditions, particularly under conditions of "total war," without forfeiting the democratic nature of the regime. Clinton Rossiter, Constitutional Dictatorship: Crisis Government in the Modern Democracies (2002 [1948]).

[71] In particular, Ackerman's theory anticipates and tries to dispel the danger that permissive emergency rule will perpetuate itself at the expense of the normal discipline of constitutional law. Thus, whereas emergency rule was easily renewed 46 times by the Turkish parliament, Ackerman's scheme provides for a "supermajoritarian escalator" to make it progressively more difficult to extend. Ackerman, *supra* note 70, at 80–90.

[72] Article 15(1) (my translation). A 2004 amendment added a second paragraph to this general restriction clause, stating that outside of acts carried out in conformity with the laws of war, the right to life and "the integrity of a person's material and spiritual being" must be respected. However, that protection is arguably negated by Art. 17, which provides that killings that occur as a result of official orders during states of emergency are exempted from the general right to life. As Bülent Tanör points out, in almost every case, the general and specific restrictions that the 1982 Constitution places on fundamental rights provisions cumulatively void those rights of their meaning. *See* Tanör, *supra* note 48, at 331.

Downloaded from https://academic.oup.com/icon/article/11/3/702/789402 by guest on 26 May 2026

the Constitution recognizes and authorizes an advance exception for unconstitutional acts, thereby introducing the specter of unconstitutionality into the constitutional order. For good measure, the 1982 Constitution subjects many fundamental rights, including the right to life, to additional special restrictions in cases of emergency rule. The pervasiveness of references to emergency rule creates the overall impression that fundamental rights are luxuries to be enjoyed only in those rare and fleeting instances where there are no overriding considerations of public policy.

For these reasons, Turkish constitutional scholar Bülent Tanör has described the 1982 Constitution as a "dysfunctional" constitution, if not an "anti-constitution" or "counter-constitution."[73] According to Tanör, its ludicrously restrictive approach toward individual rights is symptomatic of an outright contradiction at the heart of this document. Although political theory often identifies constitutional rule with the protection of individual rights against encroachments by the state, the 1982 Constitution's main concern is with protecting the state against its citizens. As such, Tanör argues that "the majority of human rights violations in Turkey [since 1982] are constitutional; that is, they are sanctioned and supported by the constitution in one way or another."[74]

What Tanör calls the manifest dysfunction or "absurdity" of the 1982 Constitution raises some interesting analytical questions: is an authoritarian constitution a flat-out contradiction in terms, or is it conceivable and recognizable *qua* constitution? To recall, my point is that the 1982 Constitution is authoritarian not necessarily and not only because it curtails the institutional expression of popular will,[75] but more importantly because it firmly subordinates individual rights to *raison d'etat* and exempts public institutions (particularly the military, the bureaucracy, and the police) from constitutional challenges from rights-holders. Understood thus, authoritarian constitutionalism suggests a much deeper challenge to the idea of constitutionalism: the Turkish example manifests a disjuncture between the formal aspect of a constitution (not least its recognized and enduring status as the basic law of the land) and the normative commitments we expect constitutions to realize, not least among them, respect for fundamental rights. On the one hand, the 1982 system incorporates the *formal* machinery of constitutionalism by establishing a binding legal framework to contain political power. On the other hand, it uses that machinery to negate the *substantive* content of constitutionalism as a political ideal, particularly where we understand that content to entail respect for individual autonomy and human dignity. In provocatively describing the 1982 Constitution as an "anti-constitution" or "counter-constitution,"

[73] Tanör, *supra* note 48, at 352.

[74] *Id.* at 352 (my translation).

[75] Although it does that too: The 1982 Constitution provides for a procedure of executive rule by decree even in the absence of a duly declared state of emergency. Provided that it can obtain a broad mandate from parliament first, the constitution allows the government to circumvent normal legislative procedures. The casual and discretionary way in which the 1982 Constitution treats democratic methods of legislation illustrates its authoritarian nature in Somek's sense. Thus, under authoritarian constitutionalism, the exercise of political power must still conform to the constitution, although what is distinctive is that the constitution itself eases the burden that such power be exercised democratically. Somek, *supra* note 25, at 362.

Downloaded from https://academic.oup.com/icon/article/11/3/702/789402 by guest on 26 May 2026

Tanör's point is not to deny its status as the basic law of the Turkish Republic, but to point to the radical betrayal of the *raison d'être* of constitutional rule.

3. Parchment barriers, revisited

In unconsolidated constitutional systems, the parchment barriers problem tends to arise when constitutional requirements do not square with political actors' ambitions and objectives. Often, these are norms meant to protect the freedom of individuals against encroachment by the state: those in power will have countless incentives and ample opportunity to abuse the rights of individuals, simply because they *can*. Even if its commands go largely unheeded, however, a liberal constitution in an authoritarian context affords a point of resistance against domination. At the very least, it provides a repository of progressive norms and aspirations that citizens can use as so many levers with which to gradually pry open oppressive political structures.[76] Independent courts can also be agents of resistance when they faithfully (sometimes even quixotically) uphold the rights, entitlements, and safeguards on which the oppressed can rely.[77] To be sure, such processes are fragile and slow, and the constitution may be snuffed out before its norms take hold.

Where a constitution does not provide for such protections in the first place, and where it structures power in favor of the state and at the expense of the individual, as Turkey's 1982 Constitution does, constitutional discipline ceases to be a liberalizing force. The parchment barriers problem arises only insofar as the constitution offers at least a toehold for progressive causes such as democratization, individual rights, or greater pluralism and transparency in the public sphere. That is to say, the parchment barriers problem presumes that a constitution is either more progressive than the reigning political forces which it seeks to contain, or that it can be interpreted in this way. Authoritarian constitutionalism, by contrast, offers limited resources for resistance. In fact, it is complicit in the denial of the liberal principles with which constitutionalism is conventionally associated. So long as the constitution does not require the state to observe any significant constraints on its power, the question of enforcing constitutional discipline does not arise. Like Alexander before the Gordian knot, Turkey's constitutional system solves the parchment barriers problem by eliminating the parchment barriers. Seen in this way, the Turkish example exposes a surprising wrinkle in the problem of constitutional discipline, which is that the parchment barriers scenario is preferable to a constitutional system that has no barriers, parchment or otherwise.

To be sure, even authoritarian constitutionalism is not without its points of resistance.[78] As Moustafa and Ginsburg point out, non-democratic regimes that resort to

[76] Mona El-Ghobashy, *Constitutionalist Contention in Contemporary Egypt*, 51(11) Am. Behav. Scientist 1590 (2008).

[77] Charles R. Epp, The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective (1998).

[78] *E.g.*, Mona El-Ghobashy shows that administrative and constitutional litigation in Egypt gradually propelled the judiciary to the status of a rival node of power within the otherwise all-pervasive executive authority of Hosni Mubarak. El-Ghobashy, *supra* note 76. *See also* Tamir Moustafa, *Law versus the State: The Judicialization of Politics in Egypt*, 28(4) Law & Soc. Inquiry 883 (2003).

Downloaded from https://academic.oup.com/icon/article/11/3/702/789402 by guest on 26 May 2026

legal and judicial means to establish greater political control also unwittingly "create a uniquely independent institution with public access in the midst of an authoritarian state."[79] In the Turkish context, however, progressive challenges to the system occur less often through the medium of law or courts than by direct political engagement by citizens, activists, political parties, social movements, including religious or ethnic minority groups. Outside forces such as the European human rights regime or the European Union's conditionality mechanisms offer additional sources of appeal.[80] Although each of these dynamics has played a significant role in Turkey's political liberalization process to date, the actors pushing for liberalization—rightly—regard the 1982 Constitution as an impediment rather than an ally in their struggles.

Thus, although scholars have argued that "rule by law" in authoritarian systems can set in motion a "double-edged" process that is just as likely to create rival hubs of power as it is to strengthen the regime's hand,[81] the progressive potential of constitutionalism has been stunted in the Turkish context, *inter alia*, by an authoritarian constitution entrusted to a judiciary that is fully vested in the Kemalist regime's priorities.[82] As Asli Bâli shows, prior to the changes made to its composition in 2010, the judicial appointment processes ensured that the Constitutional Court would be composed of judges who shared the ideological priorities of the Kemalist elite.[83] Consequently, the Court views its primary role as guardianship of the 1982 regime, which leaves little room for protecting individuals against the state. For instance, the constitution's restrictive stance towards basic rights has been magnified by the Court's reluctance to enforce whatever meager guarantees exist in the text, much less interpret them in a generous manner. Its rejection of an attempt by the Turkish legislature in 2008 to enact a liberal reinterpretation of the constitutional provisions on secularism similarly illustrates the difficulty of fashioning a jurisgenerative

[79] Tamir Moustafa & Tom Ginsburg, *Introduction: The Functions of Courts in Authoritarian Politics*, *in* Rule by Law, *supra* note 51, at 13

[80] Since the restructuring of individual access to the ECtHR in 1998 under Protocol no. 11, the ECtHR has served as an additional layer of judicial review for complainants in human rights cases against Turkey. To be sure, the ECtHR route cannot adequately substitute for *bona fide* domestic constitutional protection, as supranational justice tends to come very late to plaintiffs particularly considering the scale and urgency of many of the violations in question. For an overview, *see* Ibrahim Özden Kaboğlu and Stylianos-Ioannis G. Koutnatzis, *The Reception Process in Greece and Turkey*, *in* A Europe of Rights: The Impact of the ECHR on National Legal Systems 451 (Hellen Keller & Alec Stone Sweet eds., 2008).

In recent years, Turkish civil society has drawn inspiration and rhetorical force from references to international regimes such as the ECHR, the Universal Declaration of Human Rights, and the European Union, as well as indigenous sources such as a democratized understanding of the Kemalist inheritance. For an eloquent theory of how universal principles enshrined in international norms are contextualized, "iterated," and appropriated by democratic publics, thereby enhancing democratic praxis without losing their universalistic inspiration, *see* Seyla Benhabib, Another Cosmopolitanism (2006).

[81] Moustafa & Ginsburg, *supra* note 79, at 14.

[82] Günes Murat Tezcür, *Judicial Activism in Perilous Times: The Turkish Case*, 43(2) Law & Soc'y Rev. 305, 307–311 (2009). Tezcür is optimistic that relative to the ideologically motivated higher courts of Turkey, lower courts are more likely to be "amenable to pressures emanating from civil agents of democratization," (*id.* at 306). At present, however, there is limited evidence from lower court decisions to bear out such an expectation.

[83] Bâli, *supra* note 42. *Also see* Tezcür, *supra* note 82.

Downloaded from https://academic.oup.com/icon/article/11/3/702/789402 by guest on 26 May 2026

politics out of authoritarian law.[84] In sum, authoritarian constitutionalism is strongly resistant to attempts to reinterpret its terms, stifling the reflexivity built into constitutional self-rule and instead consolidating a hegemonic political structure.

That said, the Turkish Constitutional Court was equally reluctant to give due effect to the relatively liberal rights guarantees of the 1961 Constitution, which suggests that by itself, the text is not sufficient to effect significant institutional change.[85] As I pointed out earlier, the drafters of the 1961 Constitution devised the Constitutional Court as a means of checking parliamentary autonomy and enforcing ideological conformity with Kemalism, rather than of supervising respect for fundamental rights on the part of the executive.[86] For all its extensive guarantees of rights and novel mechanisms of checks and balances, therefore, the 1961 Constitution lacked institutional champions to realize its progressive potential. Its failure recalls Madison's anxiety that the constitution, despite its proclamations of hallowed rights and liberties, can be powerless against the ferocity of political will.

And yet, the contrast between Turkey's two constitutions suggests that so long as the distribution and balance of power amongst political actors remains roughly equal, the text *does* have some effect on how power struggles are played out.[87] In the 1960s, the military began to perceive the progressive constitution as a threat to its ideological primacy, repeatedly amending the text to curtail its progressive provisions and to cement its own role within the regime. Thus, even if the 1961 Constitution failed to set in motion a sustainable process of political liberalization in the absence of relatively powerful political actors willing to stand up for its guarantees, the mere existence of those guarantees perturbed the authoritarian regime.

In contrast to the 1961 Constitution which, at least on paper, permitted the social and cultural pluralism of Turkish society to reflect in its political system, the 1982 Constitution firmly reinstated the steadfast alliance between the Turkish judiciary, military, and the intellectual and bureaucratic elite. It formally enshrined the conditionality of civilian politics on strict adherence to the ideological "red lines" of Kemalist doctrine and cemented the military's role as the supraconstitutional guarantor of that

[84] Bâli, *supra* note 42, at 256–267. The concept of jurisgenerativity originates in Robert Cover's work and has been developed in Frank Michelman's and Seyla Benhabib's respective writings. Successful jurisgenerative politics entails a productive dialogue among rights and democracy through which the will of the people gains validity not only as "legal" but also as "legitimate." Michelman, *supra* note 16; *see also* Benhabib, *supra* note 80.

[85] As Charles Epp argues, "the effects of a bill of rights are not as direct as constitutional engineers and scholars commonly assume, because those effects depend on structural conditions." Epp singles out "support structures for legal mobilization" (in particular, lawyers, civil society groups, and other constitutional warriors to advance the cause of rights) as necessary conditions for translating the legal currency of rights into significant institutional change. The Turkish example suggests that courts must themselves be receptive and willing to enforce rights claims. Charles R. Epp, *Do Bills of Rights Matter? The Canadian Charter of Rights and Freedoms*, 90(4) Am. Pol. Sci. Rev. 765 (1996). For similar findings in the EU context, *see* Lisa Conant, Justice Contained: Law and Politics in the European Union (2002).

[86] Can, *supra* note 40, at 112. Can goes so far as to state that in Turkish politics, "[m]ilitarism could not have been upheld without the Constitutional Court" (*id.* at 114) (my translation).

[87] For an overview of the "reasons of rules," *see* James M. Buchanan, *Why do Constitutions Matter?*, *in* Why Constitutions Matter 1 (Niclas Berggren, Nils Karlson, & Joakim Nergelius eds., 2002).

Downloaded from https://academic.oup.com/icon/article/11/3/702/789402 by guest on 26 May 2026

doctrine.[88] As such, constitutional discipline in the post-1982 period should be attributed not to the consolidation of the rule of law in Turkey, but to the reconfiguration of the legal basis of public authority to reflect Kemalist hegemony. The constitution fell in line with power, rather than the other way around.

In sum, to the extent that a liberal constitution in an authoritarian system can be a jurisgenerative catalyst for free and open political institutions, authoritarian constitutionalism is likely to bolster and perpetuate the reign of the authoritarian structures that create it. At the very least, it lends the cloak of legality to the most egregious excesses of those structures. Importantly, this contrast reinforces Madison's point concerning the willingness or ability of political actors to abide by the constitution even when it contradicts their identities and perceived interests. In the Turkish case, the aspirational Constitution of 1961 papered over authoritarian bedrock, eventually being shredded by the illiberal forces still churning beneath. By contrast, the authoritarian Constitution of 1982, being entirely epiphenomenal to the hegemonic forces that created it, helped to sustain an orderly state of affairs that looks deceptively like constitutional discipline.

4. Democratizing the authoritarian constitution: A circumspect conclusion

This article has sought to give a preliminary conceptual account of authoritarian constitutionalism with reference to Turkey's 1982 Constitution, considered against the foil of its relatively progressive 1961 Constitution. I have deliberately omitted from consideration a number of noteworthy amendments that have doubtless smoothed some of the illiberal edges of the 1982 Constitution to date (not least the 2010 amendment "package").[89] I do not mean to minimize the significance of these difficult reforms in the context of Turkey's arduous project of political liberalization.[90] These reforms, ranging from the abolition of the death penalty and of the infamous state security courts to the weakening of the National Security Council's tutelary role, the elimination of constitutional immunity for perpetrators of the 1980 coup, the easing of restrictions on minority rights, particularly language rights, and limited improvements on the freedom of expression, are indeed momentous.

Of arguably greater significance than the substantive constitutional amendments is the overall shift in political power away from the old guard in favor of a civilian challenger, the moderately Islamist Justice and Development Party (AKP) led by Recep Tayyip Erdoğan. Since 2003, amendments to the 1982 constitution have been an important

[88] Thus, according to the Preamble of the 1982 constitution, the ultimate sanction for the constitution's authority comes from its adherence to "the notion of patriotism, reformism and the principles determined by the founder of modern Turkey, immortal leader and peerless hero Atatürk." (my translation).

[89] For an overview of these amendments, *see* Bâli, *supra* note 61.

[90] For an analysis of some of these changes, *see* Seyla Benhabib & Turkuler Isiksel, *Ancient Battles, New Prejudices, and Future Perspectives: Turkey and the EU*, 13 Constellations 218 (2006).

Downloaded from https://academic.oup.com/icon/article/11/3/702/789402 by guest on 26 May 2026

part of the AKP government's overall strategy of chipping away at the power of Turkey's dominant military and bureaucratic elite.[91] As a consequence, Kemalism's ideological and institutional grip on the state has unquestionably loosened over the past decade, making way for the emergence of a new political, cultural, and economic elite that, for the moment, enjoys overwhelming popular support.

These developments prompt a key question, which is: to what extent is it possible to democratize a system of authoritarian constitutionalism through popular pressure, formal amendment, and piecemeal institutional reform? A systematic answer to this question calls for extensive comparative research.[92] For its part, the Turkish case suggests that authoritarian constitutionalism encourages challengers to develop the same bad habits as the old guard. Insofar as it concentrates state power in the hands of a dominant faction and shuts out all forms of dissent and pluralism, authoritarian constitutionalism turns politics into a game of winner-take-all poker, where would-be hegemons vie for comprehensive control of the state apparatus. This is borne out by the fact that the AKP's reformist zeal seems limited to conquering constitutional obstacles to its own bid to dominate such bastions of state power as the bureaucracy, judiciary, military, and the public education system. The AKP's designs are a cause for concern, not primarily because they threaten to substitute religious fundamentalism for Turkey's intolerant tradition of secularism, but more importantly because the AKP is poised to replace one form of authoritarianism (that of the military) with another (that of potentially untrammelled one-party rule reminiscent of the CHP's role in the early Turkish republic). The AKP's plan to replace Turkey's parliamentary system with a presidential one reinforces these fears.[93]

Thus, like many other observers, I am circumspect about the possibility of rehabilitating the deeply authoritarian spirit of the 1982 Constitution. Unlike others, however, I remain equally skeptical about the possibility of a new, "civilian" constitution overcoming that authoritarian tendency without succumbing to the countervailing problem of parchment barriers (as the 1961 Constitution did). As important as the question of the limits of constitutional liberalization may be in the Turkish context, it points us towards a more fundamental issue at the heart of constitutional theory, which has been my guiding concern in this essay. That is the question of how far a constitutional text may outpace the configuration of its political context without being reduced to "mere words on parchment." As Gary Jacobsohn writes *vis-à-vis* the

[91] Aydınlı argues that this is partially attributable to internal dynamics within the military, where reformist officers have gradually taken over from Kemalist hawks. Ersel Aydınlı, *Turkey under the AKP: Civil–Military Relations Transformed*, 23(1) J. of Dem'cy 100 (2012).

[92] The teeming literature on democratic transitions investigates this question extensively. *See especially*, Guillermo O'Donnell, Philippe Schmitter, & Laurence Whitehead, Transitions from Authoritarian Rule (1988); Valerie Bunce, *Rethinking Recent Democratisation: Lessons from the Postcommunist Experience*, 55(2) World Politics 167 (2003); Democracy and the Rule of Law (José María Maravall & Adam Przeworski eds., 2003); Adam Przeworski, Democracy and the Market (1991); Carles Boix, Democracy and Redistribution (2003); Juan J. Linz & Alfred Stepan, Problems of Democratic Transition and Consolidation (1996).

[93] Emre Peker, *Turkey Eyes Move to Semi-Presidential System*, Wall St. J., July 26, 2012, http://online.wsj.com/article/SB10000872396390443931404577550873062176042.html#articleTabs%3Darticle.

Downloaded from https://academic.oup.com/icon/article/11/3/702/789402 by guest on 26 May 2026

fraught relationship between the Turkish constitution's eternity clause guaranteeing secularism and the demands of the conservative religious movement:

> Can we then know with certainty what is and is not irrevocable when speaking of Turkish constitutional identity? I would suggest that an affirmative response ought to be received skeptically. The reason for such uncertainty is not unique to the Turkish case, nor does it require adherence to a theory of constitutional indeterminacy; instead it lies in the dynamic quality of identity and the dialogical process by which it is formed and develops. Turkey's secularism, for example, was not a simple product of the imagination, but was and remains embedded in a deep cultural matrix from which counter-pressures to the dominant ideology exert a continuing, if irregular, force. . . .[94]

I take Jacobsohn's point to be that the constitution's meaning is inextricably entangled in societal norms, beliefs, and attitudes. As a result, the constitution's character and claim to authority emerge from reciprocal articulations between these normative sources, which expose the always-shifting but never infinite horizons of possibility for constitutional change. Understood thus, I believe that Jacobsohn's characterization of Turkey's secular constitutional identity as "embedded in a deep cultural matrix" is equally true *vis-à-vis* the much older, more basic, and more deeply ingrained force of state-centered authoritarianism in Turkish politics and society. Just as the constitution's secular character was not "a simple product of the imagination," the authoritarian Constitution of 1982 was not pulled out of thin air by the generals. Rather, it simply reaffirmed the profound praetorian habits and convictions of a sprawling military, bureaucratic, and judicial elite that understood itself to be heir to the Ottoman "state tradition."[95] In view of its grave hostility towards pluralistic civic engagement and democratic dissent in the public sphere over the past few years, the AKP government is proving no less of an heir to that tradition than its outgoing Kemalist guardians.[96] The solidity of the authoritarian fortress—irrespective of the political identity of its current occupants—makes sustained efforts by citizens of the republic to claim, expand, and re-articulate the basic rights and freedoms that have more often been denied than recognized by successive constitutional orders so deeply admirable, even heroic.

[94] Gary J. Jacobsohn, *If an Amendment were Adopted Declaring the United States a Christian Nation, Would it be Constitutional? Well . . . Let's look at Turkey* 7 (Unpublished manuscript 2009), *available at* http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1103&context=schmooze_papers.

[95] In the Turkish context, the term "state tradition" has been systematized by Metin Heper, although it pervades Turkish academic and public discourse as a general shorthand for Turkey's state-centered political culture. According to Heper, Turkey's state tradition is characterized by a "dominating state and a not well-organized periphery," where a "bureaucratic elite" assumes a guardianship role within the state and views the state as the central pillar of an otherwise unruly political community. *See* Metin Heper, The State Tradition in Turkey (1985), 16. Heper in turn draws on Kenneth Dyson's term. See Kenneth Dyson, The State Tradition in Western Europe (1980).

[96] In 2011–2012, Turkey ranked 148th in the world according to Reporters Without Borders's Press Freedom Index, falling 10 places from 2010. For the country report, *see* http://en.rsf.org/report-turkey,141.html. The European Commission's annual progress report in 2011 documented significant infringements on the freedoms of expression and association, the freedom of conscience, and women's rights, and noted the persistence of seriously discriminatory treatment on the basis of gender, sexual orientation, ethnic and religious origin. *See* European Commission, Turkey 2011 Progress Report, *supra* note 11, at 20–43. On the AKP's unwillingness to protect civil rights that do not affect its political agenda, *see* Berna Turam, *Turkey under the AKP: Are Rights and Liberties Safe?*, 23(1) J. of Dem'cy 109 (2012).

Downloaded from https://academic.oup.com/icon/article/11/3/702/789402 by guest on 26 May 2026